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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

GRB ENTERPRISES, LLC, a Utah Limited Liability Company, and GREGORY BLANCHARD, an Individual. Plaintiffs, vs. JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, a national banking association, Defendant. JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, a national banking association, Plaintiff, vs. GRB ENTERPRISES, LLC, a Utah Limited Liability Company, and GREGORY BLANCHARD, an Individual. Defendants,	**GRB ENTERPRISES, LLC AND GREGORY BLANCHARD'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS UNDER F.R.CIV.P. 12(b)(6), AND MEMORANDUM IN SUPPORT OF GRB'S MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER F.R.CIV.P. 56(c)** Case No. 2:11-cv-833 DAK Hon. Dale M. Kimball

GRB Enterprises, LLC and Gregory Blanchard (collectively "GRB"), by and through their attorneys, McKay, Burton & Thurman, respectfully submit their Memorandum in Response to JPMorgan Chase's Motion to Dismiss pursuant to F.R.Civ.P. 12(b)(6), and Memorandum in Support of their Motion for Partial Summary Judgment, pursuant to F.R.Civ.P. 56(c)

ISSUES PRESENTED

1. Does New York or Utah law apply in this case?

2. Does GRB's' complaint state a claim upon which relief can be granted under F.R.Civ.P. 12(b)(6)?

3. Is GRB entitled to partial summary disposition pursuant to F.R.Civ.P. 56(c)?

    a. Is there any genuine issue of material fact that the swap is unenforceable because there was no meeting of the minds on essential terms?

    b. Even if the swap is an enforceable agreement, is there any genuine issue of material fact that Chase breached the swap by failing and refusing to provide GRB with a calculation of the swap breakage fee?

INTRODUCTION

JPMorgan Chase ("Chase"), induced GRB Enterprises, LLC and Gregory Blanchard (hereinafter collectively "GRB")[1] into entering into an interest rate swap six months after GRB made a secured business loan with Chase. Chase eventually breached the swap agreement after GRB paid off the business loan in full and claimed that a "breakage fee" in excess of $140,000 was due Chase despite Chase's written representations to GRB that the swap had no fees and that there would be no prepayment penalty. On April 14, 2011, GRB sued Chase in Michigan for declaratory relief, breach of contract and fraud and misrepresentation. Chase argues that GRB's case should be dismissed for GRB's failure to state a claim upon which relief can be granted. Not only is Chase not entitled to have GRB's suit dismissed, but GRB is entitled to summary judgment with respect to its claims against Chase for declaratory relief that the swap is not enforceable and for breach of contract by Chase. Accordingly, GRB requests that this Court deny Chase's motion and grant GRB partial summary judgment.

STATEMENT OF FACTS

Chase's motion, made pursuant to F.R.Civ.P. 12(b)(6), must assume the truth of the allegations in GRB's complaint, which are:

1. The Dealership Loan.

On April 6, 2007, GRB Enterprises, LLC signed a loan agreement with Chase to finance the purchase of a Honda motorcycle dealership in Park City, Utah for $2.4 million (the "Dealership Loan"). (See Exhibit A, *Complaint*, ¶ 7). GRB is a Utah Limited Liability Company formed by Gregory Blanchard, the sole member and manager. (See Exhibit A, ¶ 1).

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[1] Because this case now consists of two cases consolidated, one wherein Chase is Defendant, and one where Chase is Plaintiff, this Brief will dispense with "Plaintiff" and "Defendant" designations.

The Dealership Loan carried a variable interest rate. (See Exhibit A, ¶ 8). So Chase, through the same loan officer who made the Dealership Loan, introduced Blanchard to the existence of a swap and encouraged Blanchard to enter into an interest rate swap agreement ("swap") as a hedge against interest rate fluctuations on the Dealership Loan. (See Exhibit A, ¶ 11).[2] The swap was touted by Chase as a "can't lose" proposition. If market interest rates moved up, GRB would make payments on the swap, but would have lower interest payments on the Dealership Loan. (*Ibid.*). There was never any reference to the swap surviving independently of the Dealership Loan.

2. Chase Provides GRB with Promotional Materials

Chase gave GRB a promotional piece regarding the benefits of placing a swap on GRB's loan. (See Exhibit A, ¶12); (See Exhibit B, *Promotional Materials*). These materials did not disclose that if GRB repaid the Dealership Loan prior to maturity, that Chase had any right to demand that GRB pay Chase a "breakage fee" if market interest rates had moved downward. (See Exhibit A, ¶¶ 19-20). Instead, the Promotional Materials explicitly stated that "[s]waps can be terminated prior to maturity without pre-payment penalties." (See Exhibit A, ¶ 20); (See Exhibit B, p. 2)(Emphasis added). The materials included a chart illustrating changes in the supposed "termination value" of the swap, but not mentioning breakage fees" or that GRB might have to write a check. (See Exhibit A, ¶ 21); (See Exhibit B, p. 4). Had GRB known that there might be a "fee" for terminating the swap if the Dealership Loan was paid off early, GRB would have never entered into the swap. (See Exhibit A, ¶ 26).

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[2] Interest rate swaps are derivative contracts between two parties who exchange or "swap" interest payments. Under a swap, one party agrees to pay interest on the specified amount at a fixed interest rate while the other party agrees to pay on the specified amount at a floating or variable rate. If interest rates rise, the party paying the fixed right has a contractual right to receive a stream of payments from the party paying the variable rate at the higher rate. Conversely, if interest rates go down, the party paying the variable rate has a contractual right to receive payments from the party paying the fixed rate. In the first three quarters of 2008, Chase made a total of $4.87 billion from swaps alone.

3. GRB Signs the Swap Documents

On October 27, 2007, GRB executed a Master Swap Agreement (the "Master Agreement"), a Schedule to the Master Agreement (the "Schedule"), and a Confirmation (the "Confirmation"). (Complaint, ¶ 9); (See Exhibit C, *Master Agreement*); (See Exhibit D, *Schedule*); (See Exhibit E, *Confirmation*). These are referred to collectively as the "Swap Documents".

Section 1(c) of the Master Agreement states that the Master Agreement and all Confirmations form a single agreement. (See Exhibit A, ¶ 35); (See Exhibit C, §§ 1(b), (c)). In the event of any inconsistency between the provisions of the Schedule and the Master Agreement, the Schedule will prevail. (*Ibid.*). In the event of any inconsistency between the provisions of the Confirmation and the Master Agreement, the Confirmation will prevail. (*Ibid.*).

4. Conflicting Terms Regarding Payoff of the Dealership Loan in the Swap Documents.

The Swap Documents are fraught with missing, conflicting, incomprehensible and vague terms. Part 1(7) of the Schedule states that "[i]t shall be an Additional Termination Event hereunder with respect to Party B [GRB] as the Affected Party if at any time: . . . (ii) the Loan Agreement [the Dealership Loan] shall be paid or prepaid in full. . . ."[3] (See Exhibit D, Part 1(7)). But Part 5(7) of the Schedule says the opposite: "[E]ach party's obligations under this

[3] Part 5, Section 5 of the Schedule does not specifically make reference to the Master Agreement but instead defines "Loan Agreement" as "that certain Business Loan Agreement dated as of October __, 2007 by and between Party A and Party B." **There is no such loan – the Dealership Loan was signed in April, not October.** (See Exhibit A, ¶¶ 37-38); (See Exhibit D, Part 5(5)).

Agreement or any transaction shall not be contingent on whether any loan or other financing . . . is repaid, in whole or in part, at any time." (Complaint, ¶ 40); (See Exhibit D, Part 5(7)).

5. The Swap Documents Do Not Contain A Formula, Method or Basis For Calculating Breakage Fees.

The Swap Documents are equally troublesome concerning calculation of a fee for a "Termination Event." The Swap Documents do not contain any formula, expression or methodology by which GRB or its counsel can determine for themselves whether and when anything is owed, the amount, or by whom in the event the Dealership Loan is paid off according to its term. Under Section 6(e) of the Master Agreement, if an Early Termination Event occurs, the Early Termination Amount equals "the sum of the Termination Currency Equivalent of the Close-out Amount . . . . determined by the non-Defaulting Party for each Terminated Transaction and (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-Defaulting Party less (2) the Termination Currency Equivalent of the Unpaid Amount owing to the Defaulting Party." (See Exhibit A, ¶ 42); (See Exhibit C, § 6(e)). This is gibberish: There is nothing in the Swap Documents or external indexes that would allow either party to calculate a "pre-payment penalty", and as later explained herein, Chase could not (and to this day cannot) provide a calculation.

Section 14 of the Master Agreement contains the definition of "Close-out Amount", the swap breakage fee which Chase claims is owed to it by GRB:

> [T]he amount of the losses or the costs of the Determining Party [Chase] that are or would be incurred under the then prevailing circumstances (expressed as a positive number) or gains of the Determining Party that are or would be realized under the then prevailing circumstances (expressed as a negative number) in replacing, or in providing for the Determining Party the economic equivalent of, (a) the material terms of that Terminated Transaction of group of Terminated Transactions, including the payments and deliveries by the parties under Section 2(a)(i) in respect of that Terminated Transaction or group of Terminated

> Transactions that would, but for the occurrence of the relevant Early Termination Date, have been required after that date****

(See Exhibit A, ¶ 44); (See Exhibit C, § 14). Section 14 of the Master Swap Agreement also states that "[a]ny Close-out Amount will be determined by the Determining Party (or its agent), which will act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result." (See Exhibit A, ¶ 45); (See Exhibit C, § 14).

Section 14 vests complete discretion in Chase to choose any computation under undefined "prevailing circumstances" in calculating the Close-out Amount. (See Exhibit A, ¶ 47); (See Exhibit C, § 14). It states that Chase may "consider any relevant information" including:

> a. "[Q]uotations (either firm or indicative) for replacement transactions supplied by one or more third parties. . . ."
>
> b. "[I]nformation consisting of relevant market data in the relevant market supplied by one or more third parties. . ."
>
> c. Information of the type referred to in (a) and (b) above from "internal sources";
>
> d. "[S]tandards and procedures described in this definition. . . ."

(*Ibid.*). But Chase does not have to consider the above information unless it reasonably believes that the quotations or market data are not readily available "or would produce a result that would not satisfy those standards." (See Exhibit A, ¶ 48); (See Exhibit C, § 14). There are no "standards" in Section 14. (See Exhibit A, ¶ 49). Chase could therefore consider any unidentified internal and external market data and quotations, or not consider them, if it determined that the data did not meet unidentified "standards". (See Exhibit A, ¶ 50). Section 14 does not explain what data Chase is to use if it determined that none of the available data met "standards". (See Exhibit A, ¶ 51). Moreover, once Chase decided what data serves its purposes, the Swap Documents do not define how that information is to be used: what gets added, or subtracted from what, and why?

6. GRB Pays Off the Dealership Loan.

In late 2010, GRB informed Chase of its intent to payoff the Dealership Loan. (See Exhibit A, ¶ 32). GRB requested a payoff amount from Chase. (See Exhibit A, ¶ 33). On October 26, 2010, Kim Beam, a Chase employee in Arizona, responded that if GRB elected to payoff the Dealership Loan that it would also be obligated to pay Chase a swap "breakage fee" in the amount of **$146,500.00** (the "Swap Breakage Fee"). (See Exhibit A, ¶ 34). This was news to Blanchard, who reminded Chase of the representations by Chase that there were no fees associated with the swap, no prepayment penalty if the Dealership Loan was paid off early.

GRB demanded a calculation of how this number was calculated. Under Section 6(d)(i) of the Master Agreement **Chase was required to provide to GRB "a statement (1) showing, in reasonable detail, such [Close-out Amount] calculations (including any quotations, market data or information from internal sources used in making such calculations), (2) specifying (except where there are two Affected Parties) any Early Termination Amount payable and (3) giving details of the relevant account to which any amount payable to it is to be paid**." (See Exhibit A, ¶ 52); (See Exhibit C, § 6(d)(1))(Emphasis Added). GRB's counsel in Detroit requested these calculations. (See Exhibit A, ¶ 53); (See Exhibit F, *Emails From David de Reyna and Jack Ulrich 10-28-10*). On October 29, 2010, Chase responded by stating, without any backup, that the Swap Breakage Fee "reflects the difference between the rate under which GRB Enterprises, LLC could execute a swap with same terms today relative to the fixed rate, multiplied by the duration." (See Exhibit A, ¶ 54); (See Exhibit G, *Email from Sara Gordon 10-29-10*). Since this "calculation" could not be found anywhere in the Swap Documents, on

November 3, 2011, GRB's counsel again requested the detailed breakdown of the Swap Breakage Fee calculations. (See Exhibit A, ¶ 55); (See Exhibit H, *Email From Jack Ulrich 11-3-10*). Chase's response again did not provide any calculation for the Swap Breakage Fee except to say that the fee was approximately $146,000.00, which was only an estimate and was subject to change without notice. (See Exhibit A, ¶57); (See Exhibit I, *Email From Sara Gordon 11-10-10*). During GRB's counsel's conversations with Chase representatives concerning the Swap Breakage Fee, no one could ever provide an explanation of how the Swap Breakage Fee worked or how it was calculated.

On November 17, 2010, GRB paid off the Dealership Loan. (See Exhibit A, ¶ 58). On January 26, 2011, having still not received a calculation of the Swap Breakage Fee, GRB's counsel sent a letter to Sara Gordon in Arizona, stating that Chase was in default of its obligations under the Swap Documents. (See Exhibit A, ¶ 60); (See Exhibit J, *Letter From Robert Kotz to Chase*). On February 3, 2011, Diane Sciacca, Chase's Executive Director and Assistant General Counsel in its Chicago, Illinois office, demanded that GRB make monthly payments pursuant to the Swap Documents. (See Exhibit A, ¶ 62). Ms. Sciacca subsequently sent two additional letters to GRB's counsel in Detroit, claiming that the payoff of the Dealership Loan was an "Early Termination Event" and that it "made the calculations required by Section 6(e) of the Master Agreement." (See Exhibit K, *Letter From Diane Scaccia 2-3-11*); (See Exhibit L, *Letter From Diane Scaccia 2-8-11*).

Remarkably, Chase has no better understanding of its documentation than does GRB. For example, Chase continued to demand monthly payments under the Swap Agreement even though no such payments were due once Chase declared an Early Termination Date. (See Exhibit A, ¶¶ 62-63).

7. GRB Files Suit And Chase Seeks to Foreclose On The Park City Property.

On April 14, 2011, after Chase still failed and refused to provide GRB with a calculation of the Swap Breakage Fee and continued to demand payment, GRB filed suit. Subsequent to the filing of GRB' Complaint, Chase filed a separate action in this Court for foreclosure of the Park City Property on the basis that GRB had not paid the Swap Breakage Fee. Chase then moved successfully to have venue transferred to this Court. The two cases have been consolidated.

STANDARD OF REVIEW

1. Chase's Rule 12(b)(6) Motion.

Plaintiff has met its burden in pleading claims for declaratory judgment, breach of contract, fraud and misrepresentation. In deciding a motion to dismiss made under F.R.Civ.P 12(b)(6) a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). A complaint is not required to contain "detailed factual allegations," however the allegations "must be enough to raise a right to relief above the speculative level... on the assumption that all allegations in the complaint are true (even if doubtful in fact)" *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007). A challenge to the *merits* of a plaintiff's claim should be addressed through summary judgment under Rule 56. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511, 122 S.Ct. 992 (2002).

2. GRB's Rule 56 Summary Judgment Motion.

Summary judgment is proper under Fed.R.Civ.P. 56(c) "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." Once the moving party has carried its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). In considering whether there exist genuine issues of material fact, the court should inquire whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Finally, all material facts asserted by the moving party shall be deemed admitted unless specifically controverted by the opposing party." *American Concept Ins. Co. v. Jones*, 935 F.Supp. 1220, 1225 (D.Utah, 1996), citing D.Utah R. 202(b)(4).

ARGUMENT

Chase has filed a motion seeking dismissal of this case. Chase incorrectly contends that GRB's claims for declaratory judgment, breach of contract, fraud and misrepresentation must all be dismissed under F.R.Civ.P 12(b)(6). The motion must be denied. GRB has filed a motion for partial summary judgment and the issues of the enforceability of the swap agreement and Chase's breaches of it. GRB's motion should be granted.

I. Utah Law Should Be Applied In This Case.

This case should be decided under Utah law. Even where a choice of law provision is contracted for "a federal court sitting in diversity must apply the choice of law provisions of the forum state in which it is sitting." *Shearson Lehman Brothers, Inc. v. M & L Investments*, 10 F.3d 1510, 1514 (10th Cir. 1993), citing *Klaxon Co. v. Stentor Electric Mfg.*, 313 U.S. 487, 61 S.Ct. 1020, 1021 (1941). Utah law provides that:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied ... unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties [sic] choice, or (b) application of the law of the chosen state would be contrary to a fundamental

> policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue which ... would be the state of the applicable law in the absence of an effective choice of law by the parties.

Electrical Distributors, Inc. v. SFR, Inc., 166 F.3d 1074, 1084 (10th Cir. 1999), quoting *Shearson*, 10 F.3d at 1514.

In *Electrical Distributors*, 166 F.3d 1074, the court had to determine whether Utah or Colorado law applied. The noncompete agreement at issue contained a choice of law provision providing for application of Colorado law. The court applied § 187(2) of the Restatement (Second) of Conflict of Laws which enforces the parties choice of law unless (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which would be the state of the applicable law in the absence of an effective choice of law by the parties. The court held that Colorado had a substantial connection to the contract because the plaintiff was a Colorado corporation with its principal place of business in Colorado. However, the court also found that Utah had a materially greater interest in determining the enforceability of certain noncompete provisions, notwithstanding the parties' choice of Colorado law "because important policy considerations of Utah are involved in assessing the validity of the covenant not to compete prohibiting [plaintiff], a Utah resident, from having employment in [his field] for a period of seven years within the entire state of Utah." *Id.* at 1084. The court chose to apply Utah law rather than Colorado law.

Chase argues "Utah courts generally uphold choice-of-law provisions in order to respect the intent of the parties." Chase's position ignores that Utah courts only enforce contractual choice of law provisions if (a) there is a connection between the chosen state's law and the transaction at issue and (b) the application of the law of the chosen state is not contrary to a fundamental policy of the forum state which has a materially greater interest than the chosen state in the determination of the particular issue. Both factors militate in favor of applying Utah, rather than New York law.

With the exception of New York being the place of Chase's incorporation, New York law has no other connection to this case or the litigants. As Chase previously argued in its motion to transfer venue "**Utah was and is the center of gravity for this case and the underlying loan transaction**." (See Exhibit M, *Brief in Support of Motion to Transfer Venue*, p. 1)(Emphasis added). Thus, by Chase's own admission, New York has no material connection to this case. Furthermore, GRB is a Utah LLC, the Dealership Loan and Swap Documents were negotiated and executed by Chase employees in Utah, Chicago, Illinois and Scottsdale, Arizona. Likewise, Blanchard is a Michigan resident and discussions concerning the Dealership Loan and Swap Documents were handled by his attorneys in Detroit, Michigan. New York has no relevant connection to this case and its law should not be applied.

More importantly, application of New York law to GRB's claims would produce an outcome contrary to Utah law. Chase cites New York case law holding that "claims for fraud and negligent misrepresentation are barred where the party asserting the claim contractually agreed not to rely on the other party's representation." New York law concerning merger or integration clauses is counter to Utah law. The Utah Supreme Court has held:

> Where a contract by an explicit term purports to be integrated, we will nevertheless allow extrinsic evidence in support of an argument that the contract is not, in fact, valid for certain reasons that we have specified. We have held that extrinsic evidence is appropriately considered, even in the face of a clear integration clause, where the contract is alleged to be a forgery, a joke, a sham, lacking in consideration, or where a contract is voidable for fraud, duress, mistake, or illegality.

Tangren Family Trust v. Tangren, 182 P.3d 326 (Utah, 2008), citing *Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah, 1985); Restatement (Second) of Contracts § 214. Thus, under New York law any fraud or misrepresentation committed by Chase in inducing GRB to enter into the swap would be excused by the fact that the Swap Documents contain integration or merger clauses. Other jurisdictions have recognized problems with New York's approach:

> In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law.

Bates v. Southgate, 308 Mass. 170, 31 N.E.2d 551, 558 (1941).

In executing the Swap Documents, GRB was unaware that the representations made by Chase employees and the written Promotional Materials provided by Chase were in actuality fraudulent and misrepresented the true nature of the swap. Chase represented that there would not be any fees or charges for termination of the swap or in the least failed to make this fact clear. Under Utah law, Chase is not permitted to make untrue statements and then hide behind boilerplate language in the Swap Documents as a basis for shielding its clear fraud and misrepresentations. To avoid the inequity that New York law would produce, Utah law should be applied.

II. There Was Not A Meeting Of the Minds As To Material Terms Of The Swap.

GRB has sufficiently pled its claim for declaratory judgment and there is no genuine issue of material fact that the Swap Documents are unenforceable. The Declaratory Judgment Act permits a federal court to declare the rights of parties "to a case of actual controversy within its jurisdiction." 28 USC § 2201(a). Utah law requires a meeting of the minds as a condition precedent to enforcement of a contract. See *Commercial Union Assoc. v. Clayton*, 863 P.2d 29, 37 (Utah App.1993) (stating that before enforcement of contract, meeting of minds must occur which must be spelled out with sufficient definiteness). "[C]ontractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms." *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048, 1050 (Utah 1978). A contract may be ambiguous if the terms expressing the parties' intent may have more than one plausible meaning. See *Seare v. University of Utah Sch. of Med.*, 882 P.2d 673, 677 (Utah.App., 1994).

Even under New York law, where the language of the contract used to express a material term is ambiguous, so that one party means one thing and another party understands it another way, there is no meeting of the minds and consequently no contract. *Computer Associates Inter., Inc. v. U.S. Balloon Mfg. Co., Inc.*, 10 AD3d 699 (2nd Dep't 2004). Further, even if parties intend to be bound by a contract, it is unenforceable if the parties understand the contract's material terms differently. *Gessin Elec. Contractors, Inc. v. 95 Wall Associates, LLC*, 74 AD3d 516 (1st Dep't 2010).

GRB's Complaint seeks a declaration from this Court that the Swap Documents do not contain the essential terms for a binding agreement and do not reflect a meeting of the minds between the parties. (See Exhibit A, ¶ 68). The Swap Documents do not contain the essential terms of the alleged agreement because they contain no formula, methodology, description or definition of how to compute the Swap Breakage Fee, which Chase claims is over $140,000. Moreover, the Swap Documents are indefinite, vague and unenforceable because they fail to identify any market data used, or rejected in calculating the Swap Breakage Fee, and allow Chase to rely on unidentified "standards" that are absent from the Swap Documents and provide that Chase may use, or not use, internal data not otherwise ascertainable. (See Exhibit A, ¶ 73(a)-(c)). In their prayer for relief, GRB asks this Court to find that Swap Documents are not enforceable agreements between the parties.

In its memorandum, Chase raises two arguments in support of its assertion that GRB has failed state a claim for declaratory judgment that Swap Documents are unenforceable. First, Chase argues that by signing the Swap Documents, GRB agreed that the contract was binding and enforceable. (See Exhibit N, *Chase Memorandum*, p. 10). Second, Chase posits that it retained discretion to calculate the Close-out Amount and "[t]here is no requirement that a contract contain a 'mathematical formula' to be enforceable." (See Exhibit N, p. 10). Both arguments lack merit.

To Chase's first point, Chase ignores that where one party means one thing in a contract term and another party understands the term another way, there is no meeting of the minds and consequently no contract - regardless of whether the contract was signed by both parties. There was clearly no meeting of minds as to the Swap Breakage Fee. As discussed later herein, GRB was told in Chase's own documents that there were no fees or prepayment penalties in the swap and the Swap Documents contain no discernable formula, methodology, description or definition of how to compute the Swap Breakage Fee. In addition, the Swap Documents are contradictory. On one hand there is an "Additional Termination Event" if the Dealership Loan is paid off (See Exhibit, D, § 1(7)), but on the other hand "[E]ach party's obligations under this Agreement or any transaction shall not be contingent on whether any loan or other financing . . . is repaid, in whole or in part, at any time." (See Exhibit D, Part 5(7)).

Chase also argues that even if there was no identifiable means of calculating the Swap Breakage Fee that it was free to use discretion in determining the amount. However, "a contract can be enforced ... only if the obligations of the parties are set forth with sufficient definiteness that it can be performed." *Bunnell v. Bills*, 13 Utah 2d 83, 368 P.2d 597, 600 (Utah, 1962) (footnote omitted), overruled on other grounds by *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah, 1982); see also *Carter v. Sorenson*, 90 P.3d 637 (Utah, 2004) ("A contract ... must have definite terms ... or else it cannot be enforced by a court."). "[W]here a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable." *Stangl v. Todd*, 554 P.2d 1316, 1319 (Utah, 1976).

In *Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 290-91 (Utah Ct.App.1994) the court recognized, that the amount of a finder's fee is an essential term of a finder's contract and determined that the parties agreement on a "reasonable" fee would be sufficiently definite to enforce their agreement where a prior contract and future contract gave guidance as to what the parties considered reasonable.

Similarly, in *Sachs v. Lesser*, 163 P.3d 662 (Utah App., 2007), the court of appeals considered whether there was a meeting of the minds with regard to the amount of a finder's fee. In *Sachs*, the plaintiff and defendant met to discuss the plaintiff's efforts in finding a joint venturer or purchaser for the company of which the defendant was a director. Subsequent to the meeting the plaintiff sent the defendant a letter outlining their agreement: The letter stated:

> I write this letter to remind you that I will expect a modest finder's fee if an agreement comes to fruition. This could be cash, a couple of prime developed lots in the new project, or some other consideration acceptable to both of us. While I believe we have an understanding as to this finder's fee, I do think that matters of this sort ought to be out on the table early on, and I hope you feel the same.

The court affirmed the trial court's grant of summary disposition in the defendant's favor:

> Although it is undisputed that Sachs sent a letter on May 17, 2001, indicating his willingness to accept "a modest finder's fee" in the form of "cash, a couple of prime

> developed lots in the new project, or some other consideration acceptable to both [parties,]" Sachs has failed to point to any facts that could support his contention that the parties actually agreed to the "modest" fee or to any other specific form or amount of compensation. Rather, it is undisputed that at the May 2, 2001 meeting, Sachs and Lesser did not discuss any specific amount of finder's fee. Additionally, Sachs admits that he did not have any specific compensation in mind when he drafted the letter and instead "was trying to draw [Rothwell] out to come up with something." It is also undisputed that, following the letter, the parties never agreed to the form or a specific amount of compensation. Therefore, Sachs's express contract claim fails as a matter of law because there was no meeting of the minds on the essential term of the fee to be paid.

In the present case, much like the letter at issue in *Sachs*, the Swap Documents make reference to a Swap Breakage Fee, but there is no evidence to suggest that Chase, let alone GRB, agreed what that fee would be or how it was to be calculated. There is no indication that GRB was aware of, let alone ever knew what the amount of the Swap Breakage Fee was, nor did Chase, despite multiple requests from GRB, provide its calculations of the same to GRB. A claimed $140,000 swap Breakage Fee would be a material term of the swap transaction. Chase would have GRB write a $140,000 check to Chase based upon faith.

The error in Chase's position is that the Swap Documents must contain all essential terms, and purport to fix and define the amount of the Swap Breakage Fee -- yet not even Chase can follow the myriad of terms and factors and articulate what that amount is. To this day, there is no way for GRB to discern or verify what the Swap Breakage Fee should be under the terms of the Swap Documents or whether some other form of obligation controlled under the incomprehensible calculation used in the Swap Documents. Thus, there is no genuine issue of material fact that there was no meeting of the minds and the Swap Documents are unenforceable. Even if there are issues of material fact, GRB has pled a sufficient claim for declaratory relief.

III. GRB Has Stated A Valid Claim For Breach Of Contract And There Is No Genuine Issue Of Material Fact That Chase Breached the Swap Documents.

GRB has adequately pled its claim for breach of contract and there is no genuine issue of material fact that Chase breached the Swap Documents. Under Utah law the elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." *Bair v. Axiom Design*, 20 P.3d 388, 392 (Utah, 2001). Similarly, New York law requires a plaintiff claiming breach of contract to plead "(1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from the breach." *National Market Share, Inc. v. Sterling Nat. Bank*, 392 F.3d 520 (2nd Cir. 2004). In *Medved v. Glenn*, 125 P.3d 913 (Utah, 2005), the Utah Supreme Court held that "if a plaintiff is able to plead a legally cognizable injury, she is entitled to seek damages not only for harm already suffered, but also for that which will probably result in the future."

The Master Agreement plainly requires that Chase provide GRB with:

> a statement (1) showing, in reasonable detail, such [Close-out Amount] **calculations (including any quotations, market data or information from internal sources used in making such calculations)**, (2) specifying (except where there are two Affected Parties) any Early Termination Amount payable and (3) giving details of the relevant account to which any amount payable to it is to be paid.

(See Exhibit C, 6(d)(i))(Emphasis added). Chase has done nothing of the sort. GRB has asked Chase for the Swap Breakage Fee calculations four times: twice on October 28, 2010 (See Exhibit F), on November 3, 2010 (See Exhibit H) and January 26, 2011 (See Exhibit J). Each time Chase failed and refused to provide GRB with the calculation and the backup for the same. The following have been Chase's response to GRB's request for a calculation:

> David the swap breakage fee reflects the difference between the rate under which GRB Enterprises, LLC could execute a swap with the same terms today relative to the fixed rate, multiplied by the duration.

(See Exhibit G).

> For your client's information, the indicative unwind amount for the swap as of the close of business on November 9, 2010, is approximately $146,000. This amount is only an estimate.

(See Exhibit I).

> Please call me at your earliest convenience and I'll conference in Ryan and John so we can walk you through the calculations for unwinding the GRB swap.

(See Exhibit O, *Email From Sara Gordon 1-20-11*)(Emphasis added). Thus, despite numerous requests that Chase provide a calculation for the Swap Breakage Fee, Chase failed or refused to provide the same. There is no genuine issue of fact that Chase has breached the swap.

In defense of its breach, Chase relies on case law allowing a contract to vest discretion in a party to, for example, proceed or not proceed with an acquisition as the basis for claiming it has not breached the swap. None of the cases cited by Chase give Chase the unfettered right to determine in secret the amount of damages and how they are calculated. Chase also claims that GRB has not adequately pleaded either causation or damages. However, GRB's complaint clearly alleges that Chase has failed to provide the contractually-required breakage fee calculations and has demanded payment by GRB of roughly $140,000.00 without providing GRB with any basis for that amount. The problem with Chase's refusal to provide GRB with the calculation of the Swap Breakage Fee is that Chase is contractually obligated to so. The failure, and apparent inability, to provide a calculation is further evidence that there could not have been a meeting of the minds between the parties.

Chase also argues that even if did not provide the calculation of the Swap Breakage Fee, as it was required to do, that GRB has not sustained damages as a result. "Plaintiffs [GRB] do not specify how not knowing the exact calculations of the Close-out Amount directly and proximately caused them damages." (See Exhibit N, p. 13). This argument is ludicrous. Chase is demanding that GRB pay Chase in excess of $140,000.00. Chase has instituted foreclosure proceedings against the Property on the basis that the Swap Breakage Fee has not been paid. GRB has been damaged, and stands to be further damaged, because Chase sold the swap on the basis that there was no Swap Breakage Fee. GRB is now being asked to pay an indiscriminate amount or face foreclosure and loss of the Property. There is no genuine issue of material fact that Chase has breached the Swap Documents, and at minimum Chase's motion should be denied as GRB has plead a prima facie case for breach of contract.

IV. GRB Has Stated A Valid Claim For Fraud And Misrepresentation.

GRB has adequately pleaded its claims for fraud and misrepresentation. Utah requires the following elements to sustain a claim for fraud:

> (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he [or she] had insufficient knowledge on which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his [or her] injury and damage.

Maynard v. Wharton, 912 P.2d 446, 450 (Utah Ct.App., 1996). In Utah, a merger or integration clause does not preclude a claim for fraud or misrepresentation arising out of the contract. The Utah Supreme Court has held:

> Where a contract by an explicit term purports to be integrated, we will nevertheless allow extrinsic evidence in support of an argument that the contract is not, in fact, valid for certain reasons that we have specified. We have held that extrinsic evidence is appropriately considered, even in the face of a clear integration clause, where the contract is alleged to be a forgery, a joke, a sham, lacking in consideration, or where a contract is voidable for fraud, duress, mistake, or illegality.

Tangren Family Trust v. Tangren, 182 P.3d 326 (Utah, 2008). Likewise, Utah law recognizes several exceptions to the merger doctrine:

> [T]he [merger] doctrine has four discrete exceptions: (1) mutual mistake in the drafting of the final documents; (2) ambiguity in the final documents; (3) existence of rights collateral to the contract of sale; and (4) fraud in the transaction.

Robinson v. Tripco Investment, Inc., 21 P.3d 219, 222-223 (Utah Ct.App., 2000).

In *Robinson*, the court of appeals considered whether the plaintiff's claims for fraud and misrepresentation were precluded by the merger doctrine. In *Robinson*, the plaintiff sought to purchase a building constructed by the defendant. During the plaintiff's inspection of the property, the defendant represented that the building was structurally strong and over-built. The purchase agreement included a clause providing that the plaintiff purchaser was purchasing the property on the basis of its own inspection and that the purchase agreement contained the parties' agreement and disclaimed plaintiff's reliance any prior or contemporaneous oral representations of the defendant. The plaintiff brought suit against the defendant after discovering that the building was structurally defective and subject to condemnation by the city. The defendant Tripco argued that the merger doctrine precluded the plaintiff's fraud claim. The Utah court of appeals disagreed. "The fraud exception applies when the party seeking to avoid merger can prove by clear and convincing evidence that the other party committed fraud in the... transaction." The court believed that there were genuine issues of material fact as to whether Tripco had committed fraud.

Chase argues that GRB's claims for fraud and misrepresentation are precluded by a non-reliance (also known as merger or integration) clause in the Master Agreement. Chase cites New York case law holding that "claims for fraud and negligent misrepresentation are barred where the party asserting the claim contractually agreed not to rely on the other party's representation." New York law concerning merger or integration clauses is counter to Utah law.

In executing the Swap Documents, GRB was unaware that the representations made by Chase employees and the Promotional Materials provided by Chase were in actuality fraudulent and misrepresented the true nature of the swap. These materials did not disclose that if GRB repaid the Dealership Loan prior to maturity, that Chase would demand that GRB pay Chase a "breakage fee" if interest rates had moved downward. (See Exhibit A, ¶¶ 19-20). Instead, the Promotional Materials explicitly stated that "[s]waps can be terminated prior to maturity without pre-payment penalties." (See Exhibit A, ¶ 20); (See Exhibit B, p. 2). This representation was made by Chase for the sole purpose of inducing GRB to enter into the swap even though Chase knew that it would demand payment of the Swap Breakage Fee if the swap was terminated early. Relying on Chase's representations, GRB entered into the swap. Had GRB known that there might be a "fee" for terminating the swap if the Dealership Loan was paid off early, GRB would have never entered into the swap. (See Exhibit A, ¶ 26). GRB has adequately pleaded its claims for fraud and misrepresentation and Chase's motion should be denied.

CONCLUSION

GRB has stated valid claims for declaratory relief that the Swap Documents are unenforceable, breach of contract by Chase and fraud and misrepresentation. Accordingly, Chase's motion should be denied. Furthermore, because there are no genuine issues of material fact that there was not a meeting of the minds as to the terms of the Swap Documents and that Chase has breached the Swap Documents, GRB should be granted partial summary judgment.

Dated this 21st day of November, 2011

McKAY BURTON & THURMAN

/s/

Bruce J. Boehm
Attorneys for Plaintiffs GRB Enterprises, LLC and Gregory Blanchard

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2011, a true and correct copy of the foregoing **GRB ENTERPRISES, LLC AND GREGORY BLANCHARD'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS UNDER F.R.CIV.P. 12(b)(6), AND MEMORANDUM IN SUPPORT OF GRB'S MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER F.R.CIV.P. 56(c)** was sent via the following method, to the following parties:

David E. Leta	______	Hand-Delivery
Michael A. Gehret	______	U. S. Mail, Postage Pre-paid
Timothy J. Dance	______	Federal Express
Snell & Wilmer	______	Fax
15 West South Temple, Suite 1200	X	ECF
Salt Lake City, UT 84101-1004		

/s/ Emilie Dazley